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# WOMEN'S ULTRASOUND RIGHT TO KNOW ACT

Model Legislation & Policy Guide  
*For the 2012 Legislative Year*



*Changing Law to Protect Human Life, State by State*

# INTRODUCTION

With each passing year, more and more women emerge from the silence after abortion. They are wounded and speak out in anguish on the physical, emotional, spiritual, and psychological harm they have suffered and still suffer as a direct result of their abortions. Often, this harm arises as a consequence of women “choosing” abortion without adequate and accurate information concerning the procedure itself, its risks, alternatives, and long-term consequences. Women’s experiences reflect the fact that abortion clinics often fail to provide adequate and accurate medical information to women considering abortion.

In the abortion industry, paternalistic attitudes toward women still prevail and, as a result, women continue to be uninformed of the risks and consequences of abortion. States have the constitutional power to take prophylactic measures to prevent this harm by passing comprehensive and carefully-drafted informed consent laws. Thus far, many states have already taken steps in the right direction, passing a variety of informed consent laws. However, there is still much that can be done to inform women completely and accurately of the reality of abortion.

Ultrasound requirements serve an essential medical purpose in that they diagnose ectopic pregnancies which, if left undiagnosed, can result in infertility or even fatal blood loss.<sup>1</sup> And just as importantly, ultrasound requirements ensure informed choice because they allow a woman to see her unborn child as he or she really is, by seeing his or her form and face on a screen and also by hearing the heartbeat. These provisions both promote the woman’s physical and psychological health and advance the states’ important and legitimate interest in protecting life.<sup>2</sup>

States should endeavor to include the following basic elements concerning ultrasounds in their informed consent laws:

- A requirement that the physician performing the abortion, the referring physician, or the qualified person assisting the physician perform fetal ultrasound imaging and auscultation of fetal heart tone monitoring, to confirm presence, location, and gestational age of the pregnancy; and
- A requirement that the physician give the woman the option of viewing the ultrasound image and hearing the fetal heart tone monitoring.

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<sup>1</sup> Mayo Clinic, *Ectopic Pregnancy* (2009), available at <http://www.mayoclinic.com/health/ectopic-pregnancy/DS00622> (last visited June 28, 2011).

<sup>2</sup> *Roe v. Wade*, 410 U.S. 113, 162 (1973).

Additionally, ultrasound requirements should contain a provision that requires the abortion provider to adhere to standard medical practice within the community and also requires him or her to accurately portray the presence of external members and internal organs, if present or viewable, of the unborn child. One concern is that, without this provision, abortion providers will use the ultrasound equipment to show a woman an image of one of her own organs and then falsely inform her that it is her unborn child. In addition, each law should require some type of certification form which describes exactly what services and opportunities the woman was provided, and also shows whether or not she opted to view the ultrasound or hear the fetal heart tone monitoring.

Ultrasound requirements that mandate ultrasound imaging and allow the woman the option to see her unborn child and hear the heartbeat are concrete, effective steps states can take to protect women's health and ensure that their consent to abortion is as fully informed as possible. In addition, medical evidence indicates that women feel bonded to their children after seeing them on the ultrasound screen.<sup>3</sup> Once that bond is established, researchers argue, a woman no longer feels ambivalent toward her pregnancy and actually begins to feel invested in her unborn child.<sup>4</sup> Thus, not only do these statutes protect women's health, but they also further the states' interest in protecting life.

For more information and drafting assistance, please contact AUL's Legislative Coordinator at (202) 741-4907 or [Legislation@AUL.org](mailto:Legislation@AUL.org).

**DENISE M. BURKE, ESQ.**  
*Vice President of Legal Affairs*  
*Americans United for Life*

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<sup>3</sup> Joseph C. Fletcher & Mark I. Evans, *Maternal Bonding in Early Fetal Ultrasound Examinations*, 308 N.E.J.M. 392 (1983).

<sup>4</sup> *Id.* at 392.

# WOMEN’S ULTRASOUND RIGHT TO KNOW ACT

HOUSE/SENATE BILL NO. \_\_\_\_\_

By Representatives/Senators \_\_\_\_\_

## Section 1. Title.

This Act may be known and cited as the “Woman’s Ultrasound Right to Know Act.”

## Section 2. Legislative Findings and Purposes.

(a) The [Legislature] of the State of [Insert name of State] finds that:

- (1) Ultrasound requirements serve an essential medical purpose in confirming the presence, location, and gestational age of a pregnancy.
- (2) Ultrasound requirements also serve an essential medical purpose in diagnosing ectopic pregnancies which, if left undiagnosed, can result in infertility or even fatal blood loss.
- (3) Furthermore, it is critical to the psychological and physical well-being of a woman considering an abortion that she receive complete and accurate information on the reality and status of her pregnancy and of her unborn child.
- (4) The decision to abort “is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences.” *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 (1976).
- (5) The knowledgeable exercise of a woman’s decision to have an abortion depends on the extent to which the woman receives sufficient information to make an informed choice between two alternatives: giving birth or having an abortion.

(b) Based on the findings in Subsection (a) of this Section, the purposes of this Act are to:

- (1) Protect the physical health and welfare of every woman considering an abortion;
- (2) Ensure that every woman considering an abortion receive complete information on the reality and status of her pregnancy and of her unborn child and that every

woman submitting to an abortion do so only after giving her voluntary and informed consent to the abortion procedure;

- (3) Protect the unborn child from a woman's uninformed decision to have an abortion;
- (4) Reduce "the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1992); and
- (5) Adopt the construction of the term "medical emergency" accepted by the U.S. Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

### **Section 3. Definitions.**

For purposes of this Act only:

(a) **"Abortion"** means the act of using or prescribing any instrument, medicine, drug, or any other substance, device or means with the intent to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child. Such use, prescription, or means is not an abortion if done with the intent to:

- (1) Save the life or preserve the health of the unborn child;
- (2) Remove a dead unborn child caused by spontaneous abortion; or
- (3) Remove an ectopic pregnancy.

(b) **"Auscultation"** means the act of listening for sounds made by internal organs of the fetus, specifically for a fetal heartbeat, utilizing an ultrasound transducer and fetal heart rate (FHR) monitor.

(c) **"Department"** means the Department of [*Insert appropriate title*] of the State of [*Insert name of State*].

(d) **"Facility"** or **"medical facility"** means any public or private hospital, clinic, center, medical school, medical training institution, health care facility, physician's office, infirmary, dispensary, ambulatory surgical treatment center, or other institution or location wherein medical care is provided to any person.

- (e) “**Medical emergency**” means that condition which, on the basis of the physician’s good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.
- (f) “**Physician**” means any person licensed to practice medicine in this State. The term includes medical doctors and doctors of osteopathy.
- (g) “**Pregnant**” or “**pregnancy**” means that female reproductive condition of having an unborn child in the [woman’s] uterus.
- (h) “**Qualified person**” means an agent of the physician who is a psychologist, licensed social worker, licensed professional counselor, registered nurse, or physician.
- (i) “**Unborn child**” means the offspring of human beings from conception until birth.
- (j) “**Ultrasound**” means the use of ultrasonic waves for diagnostic or therapeutic purposes, specifically to monitor a developing fetus.

#### **Section 4. Ultrasound Requirement.**

Except in the case of a medical emergency, at least twenty-four (24) hours before the performance of an abortion, the physician who is to perform the abortion on the pregnant woman[, *the referring physician*,] or a qualified person assisting the physician shall perform fetal ultrasound imaging and auscultation of fetal heart tone services on the patient undergoing the abortion.

#### **Section 5. Informed Consent.**

No abortion shall be performed or induced without the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

- (a) At least twenty-four (24) hours before the abortion, the physician who is to perform the abortion on the pregnant woman[, *the referring physician*,] or a qualified person assisting the physician has offered the woman, orally and in person, the opportunity to:
  - (1) View the active ultrasound image of the unborn child and hear the heartbeat of the unborn child if the heartbeat is audible; and

- (2) Receive a physical picture of the ultrasound image of the unborn child.
- (b) At the woman's request, the physician or qualified person assisting the physician must, at least twenty-four (24) hours prior to the performance of the abortion:
  - (1) Provide the active ultrasound image to the pregnant woman for her to view and auscultation of fetal heart tone for her to hear; and
  - (2) Provide a physical picture of the ultrasound image of the unborn child.
- (c) At least twenty-four (24) hours prior to the performance of the abortion, a physician or qualified person assisting the physician shall obtain the woman's signature on a certification form stating the following:
  - (1) That she has been offered the opportunity to view the active ultrasound image of the unborn child and to hear the heartbeat of the unborn child if the heartbeat is audible;
  - (2) That she has been offered the opportunity to receive the physical picture of the ultrasound image of the unborn child; and
  - (3) That the woman either (A) requested to view the active ultrasound imaging and hear auscultation of fetal heart tone services and/or receive the physical picture of the ultrasound image; or (B) that the woman opted not to view the active ultrasound imaging and hear auscultation of fetal heart tone services and/or receive the physical picture of the ultrasound image.
- (d) Before the abortion is performed or induced, the physician who is to perform or induce the abortion shall receive a copy of the written certification prescribed by Section 4(c). The physician shall retain a copy of the signed certification form in the woman's medical record.
- (e) The [*Department of Health*] shall enforce the provisions of this Act at all facilities and medical facilities that provide abortion services.

## **Section 6. Standard of Medical Practice.**

- (a) The active ultrasound image must be of a quality consistent with standard medical practice in the community, shall contain the dimensions of the unborn child, and shall accurately portray the presence of external members and internal organs, if present or viewable, of the unborn child.
- (b) The auscultation of fetal heart tone must be of a quality consistent with standard medical practice in the community.

## **Section 7. Medical Emergencies.**

When a medical emergency compels the performance of an abortion, the physician shall inform the woman, before the abortion if possible, of the medical indications supporting the physician's judgment that an immediate abortion is necessary to avert her death or that a 24-hour delay will cause substantial and irreversible impairment of a major bodily function.

## **Section 8. Civil Penalties.**

- (a) In addition to any and all remedies available under the common or statutory law of this State, failure to comply with the requirements of this Act shall:
  - (1) Provide a basis for a civil malpractice action for actual and punitive damages. Any intentional violation of this Act shall be admissible in a civil suit as *prima facie* evidence of a failure to obtain informed consent, which, except in the case of a medical emergency as defined by this Act, constitutes medical malpractice.
  - (2) Provide a basis for a professional disciplinary action under [*Medical Malpractice Act*].
  - (3) Provide a basis for recovery for the woman for the wrongful death of her unborn child under the [*Wrongful Death Act*], whether or not the unborn child was born alive or was viable at the time the abortion was performed.
- (b) When requested, the court shall allow a woman to proceed using solely her initials or a pseudonym and may close any proceedings in the case and enter other protective orders to preserve the privacy of the woman upon whom the abortion was performed.



(c) If judgment is rendered in favor of the plaintiff, the court shall also render judgment for a reasonable attorney's fee in favor of the plaintiff against the defendant.

(d) If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney's fee in favor of the defendant against the plaintiff.

### **Section 9. Criminal Penalties.**

(a) Any person who purposefully, knowingly, or recklessly performs or attempts to perform or induce an abortion without complying with Section 4 with this Act is guilty of a [*Insert appropriate penalty/offense classification*].

(b) Any person who purposefully, knowingly, or recklessly performs or attempts to perform or induce an abortion without complying with any other provision of this Act is guilty of a [*Insert appropriate penalty/offense classification*].

### **Section 10. Construction.**

(a) Nothing in this Act shall be construed as creating or recognizing a right to abortion.

(b) It is not the intention of this law to make lawful an abortion that is currently unlawful.

### **Section 11. Right of Intervention.**

The [*Legislature*], by joint resolution, may appoint one or more of its members, who sponsored or cosponsored this Act in his or her official capacity, to intervene as a matter of right in any case in which the constitutionality of this law is challenged.

### **Section 12. Severability.**

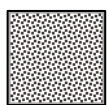
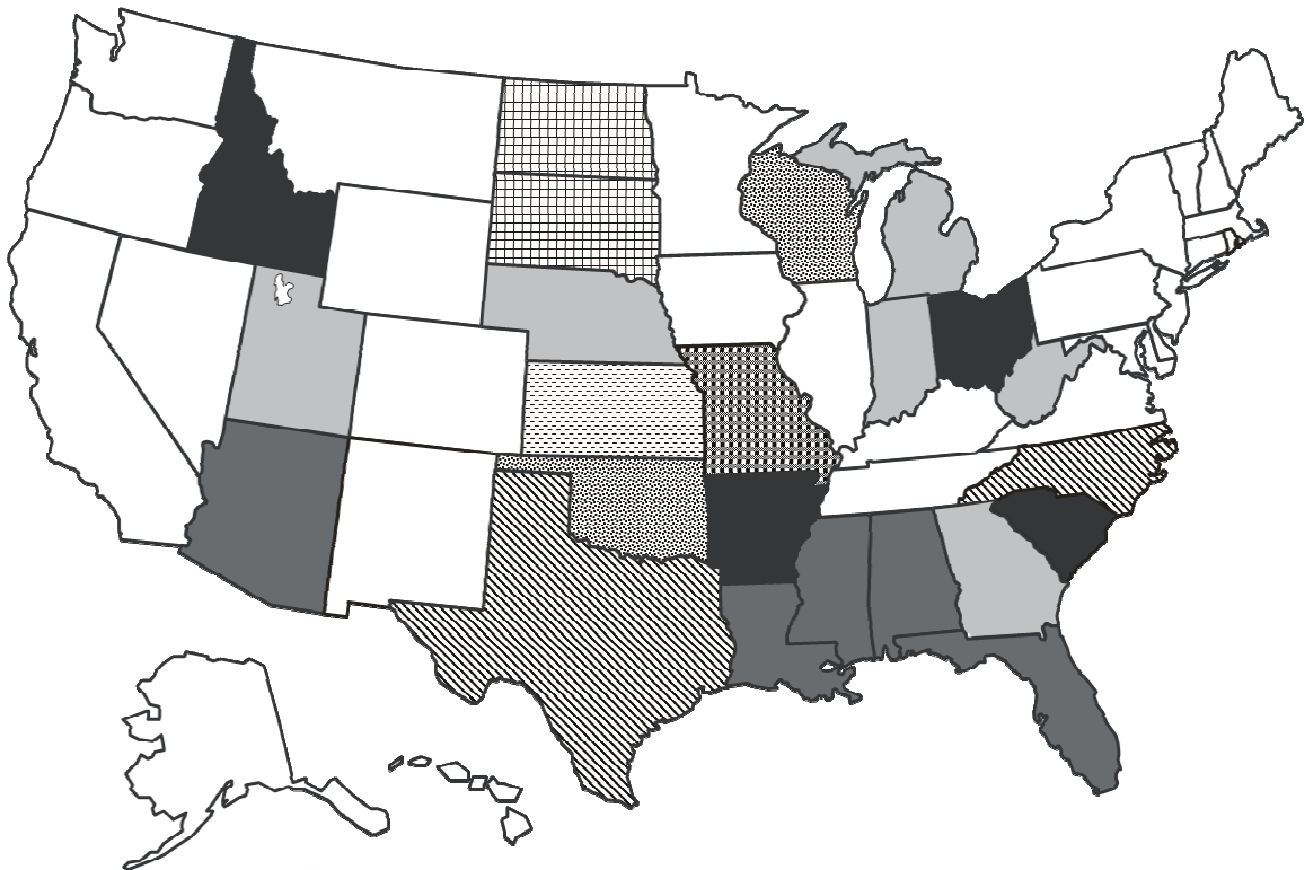
Any provision of this Act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable here from and shall not affect the remainder hereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

**Section 13. Effective Date.**

This Act takes effect on [*Insert date*].

# STATE OF THE STATES: WHERE ARE WE NOW? INFORMED CONSENT REGARDING ULTRASOUND

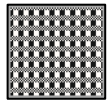
Twenty-one states require women receive information about the availability of ultrasound services prior to abortion or require the performance of an ultrasound prior to abortion:  
AL, AZ, AR, FL, GA, ID, IN, KS, LA, MI, MO, MS, NE, ND, OH, OK (additional law enacted in 2010 is enjoined and in litigation ), SC, SD, UT, WI, and WV.



Two states require verbal counseling and/or written materials to include information on ultrasound services: OK and WI.



Six states require verbal counseling and/or written materials to include information on ultrasound services and require the abortion provider to offer the opportunity to see an ultrasound image if ultrasound is used in preparation for the abortion: GA, IN, MI, NE, UT, and WV.



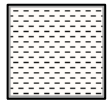
One state requires verbal counseling and/or written materials to include information on ultrasound services and requires the abortion provider to offer the opportunity to see an ultrasound image, even if ultrasound is not used in preparation for the abortion: MO.



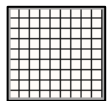
Four states require the abortion provider to offer a woman the opportunity to see an ultrasound image if ultrasound is used in the preparation for the abortion: AR, ID, OH, and SC.



Five states require an ultrasound for each abortion and require the abortion provider to offer the opportunity to view the image: AL, AZ, FL, LA, and MS.



One state requires an ultrasound for each abortion and requires the abortion provider to review, at the request of the woman, the ultrasound evaluation results: KS.



Two states require the abortion provider to offer the opportunity to view an ultrasound image: ND and SD.



Two states' ultrasound laws are in litigation: NC and TX.

More detailed information about the need and justification for ultrasound requirements and informed consent laws can be found in AUL's annual publication *Defending Life 2011: A State by State Legal Guide to Abortion, Bioethics, and the End of Life*.

*Defending Life 2011* is available online at [AUL.org](http://AUL.org).

For further information regarding this or other AUL policy guides, please contact:

AMERICANS UNITED FOR LIFE  
655 15th Street NW, Suite 410  
Washington DC 20005  
202.289.1478 | Fax 202.289.1473 | [Legislation@AUL.org](mailto:Legislation@AUL.org)  
[www.AUL.org](http://www.AUL.org)

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